

Holiday Medical Center, Inc., d/b/a Medi-Center of America, HBA Corporation, and Health Care Services group, Inc. and 1115 Nursing Home and Hospital Employees Union, A Division of 1115 Joint Board. Case 4-CA-19075

February 12, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

October 16, 1990, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Cases 4-RC-17010 and 4-RC-17021. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On December 26, 1990, the General Counsel filed a Motion for Summary Judgment. On January 2, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On January 15, 1991, the Respondent filed a response.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and response to the Notice to Show Cause the Respondent admits its refusal to bargain, but

attacks the validity of the certification based both on the substance of its objections to the election in the representation proceeding, and on the ground that the Board improperly rejected those objections as untimely filed.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Holiday Medical Center, Inc., d/b/a Medi-Center of America, HBA Corporation, and Health Care Services Group, Inc., a New Jersey corporation, operates a nursing home at its facility in Lakewood, New Jersey, where it received gross revenues in excess of \$100,000 and purchased and received goods and materials valued in excess of \$10,000 directly from points outside the State of New Jersey, all during the past calendar year. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following an election held November 22, 1989, the Union was certified on May 18, 1990, as the collective-bargaining representative of the employees in the following appropriate unit:

Included: All full-time and regular part-time orderlies, nurses aides, dietary workers, house-

¹ On January 14, 1991, District 6, International Union of Industrial Service Transport and Health Employees, filed a request for special permission to appeal the Regional Director's denial of its motion to intervene in the instant proceeding. The District claims that it is entitled to intervene inasmuch as it was an intervenor in the underlying representation proceedings, and because it would otherwise be foreclosed from seeking judicial review of the issues raised in those proceedings. On January 24, 1991, the General Counsel filed an opposition to the District's request.

We deny the District's request for special permission to appeal. Sec. 10(b) of the Act expressly provides that intervention in unfair labor practice proceedings is discretionary with the Board, and not a matter of right. In the exercise of that discretion, we find that the purposes and policies of the Act would best be served by denying intervention in the instant circumstances. First, allowing District 6 to intervene in this proceeding would afford it an avenue for obtaining judicial review of the issues in the representation proceeding that the statutory scheme otherwise denies. See *American Federation of Labor v. NLRB*, 308 U.S. 401, 411 (1940). Second, the District's participation as an intervening party, with all the rights that such participation extends, would unduly delay the proceeding. The Board's bargaining order in this case runs only against the Respondent Employer, its successors and assigns—not the District—and the Respondent is fully capable of defending itself in this regard. Finally, to the extent District 6 seeks to assert objections or protect interests different from the Respondent's, it has other means by which to do so. See *NLRB v. Lawrence Typographical Union* 570, 376 F.2d 643 (10th Cir. 1967); and *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969) (validity of election reviewed in subsequent 8(b)(7) proceeding).

² In its exceptions to the Regional Director's finding that its election objections were untimely, the Respondent argued that the Board should adopt Member Cracraft's dissenting position in *Drum Lithographers*, 287 NLRB 22 (1987), and extend the time for filing objections to allow for the intervening Thanksgiving holiday. At no time, however, has the Respondent argued that the Board should follow the additional position set forth in Member Cracraft's *Drum Lithographers* dissent and apply the "postmark" rule to objections; or alleged that its objections, which were filed the day after the due date, would have been timely under that rule. Accordingly, we find it unnecessary to address in this case whether the Board's recent decision in *John I. Haas*, 301 NLRB 300 (1991), which overruled *Drum Lithographers* and adopted the "postmark" rule for objections, should be applied retroactively.

keepers and laundry workers employed by the Respondent at its Lakewood, New Jersey facility.

Excluded: All other employees, professional employees, registered nurses, licensed practical nurses, technical employees, maintenance employees, clerical employees, cooks, recreation employees, instructors, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since on or about May 22, 1990, the Union has requested the Respondent to bargain, and, since July 5, 1990, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after July 5, 1990, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Holiday Medical Center, Inc. d/b/a Medi-Center of America, HBA Corporation, and Health Care Services Group, Inc., Lakewood New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

Included: All full-time and regular part-time orderlies, nurses aides, dietary workers, housekeepers and laundry workers employed by the Respondent at its Lakewood, New Jersey facility.

Excluded: All other employees, professional employees, registered nurses, licensed practical nurses, technical employees, maintenance employees, clerical employees, cooks, recreation employees, instructors, guards and supervisors as defined in the Act.

(b) Post at its facility in Lakewood, New Jersey, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER CRACRAFT, dissenting.

As indicated by the majority, it is my position that the 7-day period for filing objections should be extended by 1 day where a holiday falls during the first 6 days of the objections filing period. See my dissenting opinion in *Drum Lithographers*, 287 NLRB 22, 23 (1987). I dissented on this ground in the underlying representation case and would have found that the Respondent's objections were timely filed. Therefore, in my view, the certification of the Union was improper. Accordingly, I would deny the General Counsel's Motion for Summary Judgment and I dissent from my colleagues' finding of a violation of Section 8(a)(5) herein.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with 1115 Nursing Home and Hospital Employees Union, a Division of 1115 Joint Board as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on

terms and conditions of employment for our employees in the bargaining unit:

Included: All full-time and regular part-time orderlies, nurses aides, dietary workers, housekeepers and laundry workers employed by the Respondent at its Lakewood, New Jersey facility.

Excluded: All other employees, professional employees, registered nurses, licensed practical nurses, technical employees, maintenance employees, clerical employees, cooks, recreation employees, instructors, guards and supervisors as defined in the Act.

HOLIDAY MEDICAL CENTER, INC. D/B/A
MEDI-CENTER OF AMERICA, HBA CORPORATION, AND HEALTH CARE SERVICES GROUP, INC.